SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

Nos. 453 to 475.

JOHN M. SLOAN ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA ET AL., APPELLEES, AND TWENTY-TWO OTHER CASES, BEING NOS. 453 TO 475, INCLUSIVE.

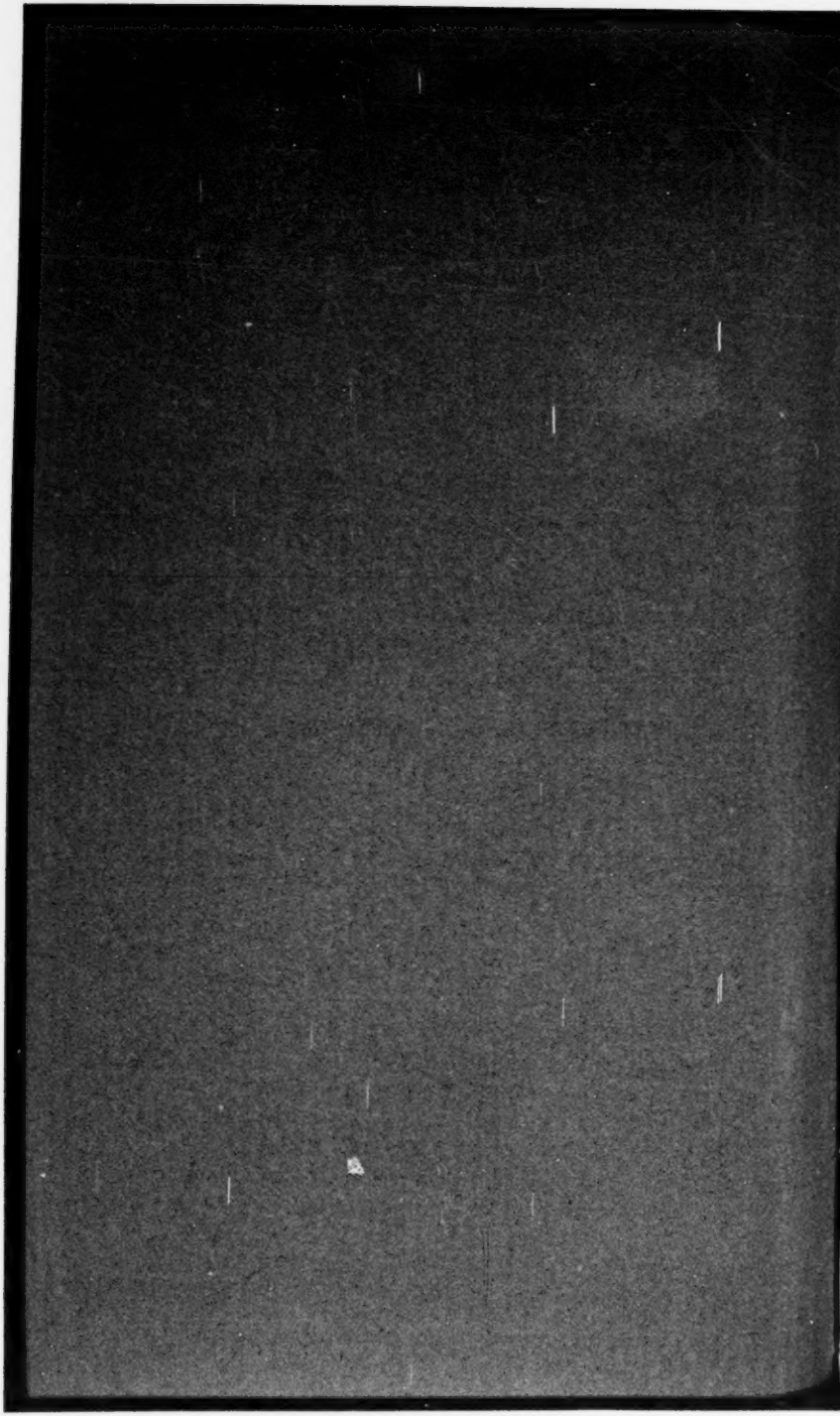
APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

REPLY BRIEF FOR APPELLANTS.

CHARLES E. CLAPP,
THOMAS L. SLOAN,
H. C. BROME,
ANDERSON AND KREYS,
Attorneys for Appellants.

W. S. SUMMERS,
JOHN L. WEBSTER,
HENRY M. HOYT,
Solicitor General of the United States,
Attorneys for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10110



31191

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

JOHN M. SLOAN ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA ET AL. AND TWENTY-TWO OTHER CASES, BEING NOS. 453 TO 475, INCLUSIVE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

REPLY BRIEF OF APPELLANTS.

The appeals in these cases were brought under the following subdivision of section 5 of the act of Congress of March 3, 1891:

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

These appellants claim by their pleadings that they are members of the Omaha tribe of Indians and beneficiaries under the treaty of March 16, 1854, and all the subsequent treaties and acts of Congress relating to the said Omaha tribe.

That the usages and customs of the tribe in general applied also to these appellants. That all the tribal benefits

to which the members of the tribe are entitled under the treaties and acts of Congress have not been relinquished by these appellants, and that they exist on behalf of the tribe by virtue of the treaty of March 16, 1854.

The appellees claim that by the construction of the treaties of July 15, 1830, and the treaty of March 6, 1865, as interpreted by them, the membership of these appellants was terminated (Record, p. 15).

All the rights which the Omaha Indians now enjoy or have enjoyed since 1854 have their origin and foundation in that treaty. These appellants or their immediate successors were members of the tribe enjoying the benefits of said treaty. The annuity rolls on pages 35 to 52 of the record show payments to Antoine Barada and family, to Margaret Sloan and family, and Mary Bono, later known as Mary Monette. The appellants, Celestine B. Kuhn, Thomas Barada, John M. Sloan, Artemesia Frost, and Euphrasia Peters, were members of the families then paid, the last-named being the mother of the appellants named Peters, Mitchell, Sailors, and Rockwell (pp. 94, 95, 367, 339, 340, Record). It is stipulated that Antoine Barada and Mushunumpashi are one and the same person (p. 66, Record), in which name Antoine Barada was paid annuities for himself and family.

The intention of the Indians concerning their mixed-blood relatives is shown by the testimony of Robert W. Furnas, one of the commissioners on the part of the United States in making the treaty of March 6, 1865 (p. 215, Record).

A number of mixed-blood Omaha Indians not living upon the reservation at the date of August 7, 1882, or at any other time received allotments (pp. 77, 78, 120, 133, 517, 518, Record).

"The construction of treaties is the peculiar province of the judiciary; and except in cases purely political, Congress has no constitutional power to settle the rights under a

treaty or to effect titles granted by the treaty itself" (Jones *v.* Meehan, 175 U. S., 2).

"As the construction of a treaty made under the authority of the United States and constitutionality of an act of Congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon appeal, and determined those questions, and having thus acquired jurisdiction of the cause, it could have determined any question of jurisdiction of the circuit court" (Robinson *v.* Caldwell, 165 U. S., 392).

"A suit to establish a land claim by virtue of the treaty of 1821 with Spain is properly brought by direct appeal from the circuit court to the Supreme Court of the United States" (Mitchell *v.* Furman, 180 U. S., 402).

"A motion to dismiss for want of a Federal question cannot be sustained when the title involved depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 with Spain and a patent of the United States in alleged confirmation of such claim (Mobile Transportation Co. *v.* Mobile, 187 U. S., 479).

"It is quite clear, that, in fact, neither the construction nor the validity of any treaty of the United States or made under its authority is in any way involved, or arises, or is drawn in question in this case. Mere allegations to that effect not based upon the facts in the case, do not create a case which we are authorized to review. * * * Moreover, the defendants did not connect themselves in any way with the Indian treaties, or with any of the parties to them; nor did they claim any rights under said treaties; or under any of the parties to them. In no true sense, therefore, can it be said that this is a case in which the validity or construction of any treaty made under the authority of the United States is drawn into question by a party having a rightful interest in such question" (John Budzisz *v.* Illinois Steel Co., 170 U. S., 44).

These appellants are directly connected with the treaties set forth in the pleadings and which have been construed by the Department of the Interior as applying to them and also construed by the court below in reaching his conclusion of these cases.

"True, the course of events has not been what was then contemplated, *but in order to determine the meaning of this contract we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations.* In that light we see nothing in the matters suggested by counsel sufficient to overthrow the plain import of the language used in the agreement, and must conclude by such agreement the Delawares became incorporated into the Cherokee Nation, became members thereof, and as such, entitled equally with the native Cherokees to all their rights in the reservation and outlet.

"Further, it may be remarked that the action of the Cherokee Nation up to the year 1882 was in the line of the construction we have placed upon this contract, for up to that date there was no distinction made between the native Cherokees and these Delawares in the distribution of funds from whatever source obtained. Out of the moneys received by the Cherokee Nation on account of lands west of the 96th degree set apart for the Osage Indians, under the act of June 5th, 1872, $200,000 was distributed *per capita*, in which distribution the Delawares shared equally with the native Cherokees. And again, when, on account of sales west of the 96th degree, Congress on June 16, 1880, appropriated $300,000, such sum was also paid out *per capita* the Delawares sharing equally with the native Cherokees. Such action is of significance in determining the understanding of the parties to the contract" (Cherokee Nation *v.* Journey-cake, 155 U. S., 216).

"The facts of this case are, that the claimant, F. R. Robinson, is a white man; that on the 21st day of September, 1873, in the Choctaw Nation and according to their laws, he married a Choctaw woman by blood, a recognized citizen of the Choctaw Nation; that the said Indian wife died on the 21st day of April 1884, and on August 10, 1884, claimant married a white woman, not a citizen of the Choctaw Nation. * * *

"*The treaty makes every white man who may marry a Choctaw or Chickasaw woman a citizen*, to use the language of the last words of article 28, above set out, '*in all respects as though he was a native Choctaw or Chickasaw.*' By this provision of the treaty there is no difference between a citizen by virtue of his marriage and a native Choctaw. *They are to enjoy equally and alike all of the benefits of Choctaw citizenship, as*

well as share the burdens. Any act therefore, *of the Choctaw council* passed after the ratification of the treaty *which makes a distinction between them, granting to one greater privileges or rights, or imposing on him more burdens than the other, or which shall undertake to enlarge or curtail the rights and privileges which flow from citizenship as to the one and not as to the other, would be in violation of this provision of the treaty and therefore void. An act which puts the white man in any respect in a different attitude or condition than the Indian is void.*

"The Choctaw statute undertakes to deprive the white man who shall lose his Indian wife and afterwards marry a white woman of all rights of citizenship. The marriage has vested a title to the lands in him. This is to be divested from him and he is thereafter to be considered an intruder, subject to be removed from the country under the intercourse laws of the United States. This, too, notwithstanding the fact that his children, *the issue of his Indian marriage,* are Indians by blood and entitled to remain.

"Now, unless a marriage of a native Indian to a white woman, after his Indian wife shall have died, has the same effect on him—that is, decitizenizes him, divests him of all title to the Choctaw lands, and deprives him of the right to live in the country—the statute works an inequality, and the white man does not enjoy the same privileges as the native Indian. The citizenship is different, and the rights flowing therefrom are not the same. The one may do an act that the other cannot do; the one has a privilege, that of marrying a white woman, that the other does not enjoy. The important right of unrestricted selection of a wife enjoyed by the native Indian is denied the white citizen by marriage; and therefore, the provisions of the statute being in conflict with the treaty, are absolutely void; and it makes no difference whether the first marriage was before or after the enactment of the statute. Of course the latter marriage must be in accordance with the laws of the Choctaw Nation.

"I, therefore, find that the claimant is entitled to be enrolled. I also hold *that the offspring of such a marriage would be entitled to be enrolled;* the father being a *lawful citizen, his children would follow his citizenship,* and by inheritance take any property rights he may have acquired thereby; but I do not think that the commissioners who negotiated the treaty ever contemplated that it should extend further and enable a white man, whose Indian wife should have died, to

be in a condition that by his second marriage to a white woman he could, by virtue of such marriage, confer on his white wife citizenship so far that in case of his death she might remarry and confer on her white husband and her children by her second marriage the rights of Choctaw citizenship.

"The action of the Dawes commission in enrolling the claimant is affirmed. Judgment for claimant."

In re Citizenship Cases, Sixth Report of Commission to Secretary of the Interior, 1899.

"When a white person has married a Choctaw or Chickasaw according to their laws, and resides in the Choctaw or Chickasaw Nation, he is in all respects 'as though he was a native Choctaw or Chickasaw,' and his right under the treaty attaches, and it is not within the power of the Choctaw or Chickasaw Nation to take the same away by legislation or otherwise. *It has been said that when adoption takes place by an act of their legislature, the same power that granted can take away. I doubt this proposition, if by the adoption treaty rights have attached, and I am firmly of the opinion that property rights that have attached under the treaty* cannot be taken away and *that only political rights could be thus abrogated.*

"Along the lines herein indicated the citizenship cases pending in this court will be disposed of."

In re Citizenship Cases, opinion of Hosea Townsend, judge, Sixth Annual Report of Commission to Secretary of the Interior, 1899, page 110.

"Full faith and credit will be given to the judgments of the tribunals and commissions in citizenship cases, unless it is made to appear that the tribunal or commission acted without jurisdiction, or that its judgment was procured by fraud, as more fully explained in this opinion. The acts of the Cherokee council in the determination of applications for citizenship in the nation will be regarded as judgments of a court, and will be subject to the same tests as to their validity."

In re Citizenship Cases, opinion of William M. Springer, judge, Sixth Annual Report of Commission to Secretary of the Interior, 1899, page 133.

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS,
"WASHINGTON, *March* 16, 1892.

"SIR: Each member of an Indian tribe has been deemed to have an equal interest in the property of his tribe, whether it be the occupancy of lands or right in the lands or moneys.

"In a property sense, therefore, an Indian is one who is by right of blood, inheritance, or adoption entitled to receive the *pro rata* share of the common property of the tribe. * * *

"One of the most intelligent Indians known in the history of our dealings with the Indians was John Ross, a Cherokee chief, who was a half-breed, yet he was always treated as an Indian, and his descendants are now treated and regarded as Indians.

"Under the rule upon which a family is constructed among civilized nations, the predominant principle is descent through the father. The father is the head of the family. When a man marries, his wife separates herself from her family and kindred and takes up her abode with her husband, assumes his name, and becomes subordinate, in a sense, to him. In many cases the eldest son becomes the heir, and in all social and political arrangements the relationship through the father is the dominant one.

"Among the North American Indians however, the line of the descent in many tribes (though not in all at the present day) is through the mother, and in many instances the wife and not the husband is recognized as the head of the family. Often when the Indian marries, instead of taking his wife to his home he goes to hers and becomes absorbed in her family. But even in tribes having descent in the male line there are notable survivals 'of mother right,' as it is called by some; for example the Dakota mother-in-law (even among the Santees in 1871) can take her daughter from the husband and give to another man. * * *

"*Status of Indian Women Married to Citizens of the United States.*

"Under the date of February 10th, 1855, an act of Congress was approved (10 Stats., 604) which provides that 'any woman who is now or may hereafter be married to a citizen of the United States, and who herself may be lawfully nat-

uralized, shall be deemed herself a citizen.' As the courts have declared that an Indian cannot be naturalized under our general naturalization law (6th Federal Reporter, 256), an Indian woman under the statute just quoted could not, by marriage with a citizen of the United States become a citizen herself. By the act of August 9, 1888 (25 Stats., 392), Congress declared that any Indian woman (except a member of the Five Civilized Tribes) who should thereafter marry a citizen of the United States should be deemed a citizen herself by virtue of such marriage, but that in thus becoming a citizen she would in no way forfeit her rights to an interest in the property of her tribe.

"According to this an Indian woman married to a citizen of the United States prior to August 9, 1888, not only did not become a citizen herself by reason of such marriage, but she did not lose her connection with her tribe nor cease to be an Indian, so that the law of descent among the Indians which is often through the mother, would seem to have included her offspring as members of her tribe.

"The issue of marriages between such white persons and Indians of the tribe into which they have been adopted are therefore, to all intents and purposes, just as much members, of the tribe as are the issue of marriages of Indian members of the tribe of the full blood and just as much entitled to benefits from the common property of the tribe. * * *

"Also, where Congress has required a census to be taken of an Indian tribe (as in the case of the Chippewas (25 Stats., 642) the roll of names submitted of those recognized by the Indians as members of their tribe, including half-breeds and mixed bloods, has been accepted by the executive department of the Government without question as conforming to the requirements of the statute.

* * * * * * *

"It seems to me with my present light that in determining the rights and privileges of mixed bloods we must give to the term 'Indian' a liberal and not a technical or restrictive construction. It must be construed in its historical and not in its ethnological significance. The law of descent must be determined not after Roman or English precedents, but in accordance with Indian usage and our American administrative sanction.

"Any other conclusions announced now as a binding rule having retroactive consequences would result in invalidat-

ing treaties and agreements, disregarding vested rights, and introducing confusion in the entire Indian question.

"Of course when the Indians shall have become citizens of the United States by taking allotments, or otherwise, the law of inheritance, where not fixed by specific statutes will be determined by the common law as applied to all other classes of people.

"Very respectfully, your obedient servant,

"T. J. MORGAN,
"*Commissioner.*

"The SECRETARY OF THE INTERIOR."

Senate, 53d Congress, 2d sess. Ex. Doc. No. 59.

The following case has not been published in any of the law reports which we are able to find.

The opinion was rendered May 24, 1902.

"In the circuit court of the United States, district of South Dakota. Jane E. Waldron, complainant *vs.* The United States of America, Black Tomahawk and Ira Hatch, as Indian agent, defendants. On demurrer to bill, Bartlett Tripp and Charles Deland, solicitors for complainant. James D. Elliott, United States attorney, and William G. Porter, assistant United States attorney for defendants.

"Attorney General Olney, in speaking upon the question here involved, uses the following language: 'The persons entitled to such rights are the persons who, at the time of the agreement, constituted the Sioux Nation and were lawful members thereof. The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement is to be determined, in my opinion, not by the common law, but by the laws and usages of the tribe, (Ex. Doc. No. 59, 53d Cong.,2d sess., p. 109).

"The cases of the Kansas Indians, 5th Wallace, 737, and Brown *vs.* Steele, 23 Kansas, 473, support the general principle herein stated. Other cases might be cited to the same effect, but it is unnecessary for the purposes of this decision."

"The court has considered the opinions written in the course of the contest upon this land in the Department of the Interior, but it is not persuaded that the rule therein

announced is the correct one to apply to the case under consideration. This court does not hold that all mixed bloods of the Sioux Nation are entitled to allotments, nor that all full-bloods are so entitled, but that in each case the vital question must be: Was the party claiming land in allotment a member of the tribe of Sioux Indians in such a sense as to come within the true meaning of the word Indian, as used in the act of Congress of March 2, 1889. From the facts admitted in this case it must be held that the complainant is an Indian within the meaning of the word as used in the act last cited. The bill otherwise states a cause of action. The demurrer will be overruled and defendant will be given until the July rules in which to answer if they are so advised."

"And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein *v.* Lynham, 100 U. S., 483, 487." (Geofroy *v.* Riggs, 133 U. S., 258, 271.)

"Payment *per capita* must be regarded as a *badge or recognition* of an individual communal interest." (Whitmore *vs.* Cherokee Nation, 30 Ct. Cls., 138).

Respectfully submitted.

THOMAS L. SLOAN,

H. C. BROME,

Attorneys for Appellants.